

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

MARTIN JONATHAN BATALLA VIDAL, 16-CV-4756 (NGG)
et al.,

Plaintiffs,

-against-

KRISTJEN M. NIELSEN, et al.,

Defendants.

STATE OF NEW YORK, et al., 17-CV-5228 (NGG)

Plaintiffs,

-against-

United States Courthouse
Brooklyn, New York

DONALD TRUMP, et al.,

Defendants.

December 10, 2020
2:30 p.m.

TRANSCRIPT OF STATUS CONFERENCE VIA VIDEOCONFERENCE
BEFORE THE HONORABLE NICHOLAS G. GARAUFIS
UNITED STATES SENIOR DISTRICT JUDGE

APPEARANCES:

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21 Proceedings recorded by mechanical stenography, transcript
22 produced by computer-aided transcription.

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1 THE CLERK: This is the DACA matter, on both DACA
2 matters.

3 Beginning with the plaintiffs, please state your
4 appearances for the record.

5 MS. MARTINEZ-OLGUIN: Good afternoon. This is
6 Araceli Martinez-Olguin of the National Immigration Law Center
7 for the Batalla Vidal plaintiffs.

8 MS. REBERT: Trudy Rebert of the National
9 Immigration Law Center.

10 MS. JOACHIN: Good afternoon. Mayra Joachin, also
11 with the National Immigration Law Center for the Batalla Vidal
12 plaintiffs.

13 MS. TUMLIN: Good afternoon. Karen Tumlin with the
14 Jerome N. Frank Legal Services Organization at Yale Law School
15 for the plaintiffs.

16 MS. ORIHUELA: Good afternoon. Marisol Orihuela,
17 also from the Jerome N. Frank Legal Services Organization for
18 the plaintiffs.

19 MR. AHMAD: Good afternoon, Your Honor. Muneer
20 Ahmad, also with the Jerome N. Frank Legal Services
21 Organization.

22 THE COURT: Is that everyone on the plaintiffs'
23 side? Okay.

24 MR. COLANGELO: I'm sorry, Your Honor. Good
25 afternoon. This is Matthew Colangelo for the State of New

1 York in the New York matter. Thank you, Your Honor.

2 MS. DASGUPTA: And Anisha Dasgupta for the State of
3 New York.

4 THE COURT: And for the government?

5 MR. PEZZI: Good afternoon, Your Honor. Stephen
6 Pezzi from the U.S. Department of Justice on behalf of
7 defendants.

8 MR. ROSENBERG: Good afternoon, Your Honor. This is
9 Brad Rosenberg, an assistant director in the Federal Programs
10 Branch, also on behalf of the defendants.

11 THE COURT: Anyone else from the government?

12 I think we are set then. We can go ahead?

13 All right. Thank you, everybody.

14 First of all, I want to thank you all for meeting
15 and making considerable progress as reflected in your joint
16 status report which I have read and reviewed. I am heartened
17 to see that the government is making a good faith effort to
18 provide individualized notice to the class members.

19 I also want to thank the government for making the
20 change to the language on the DHS public notice earlier this
21 week, but I would like to register my concern with the
22 original notice as it was posted. I would just like to say
23 briefly that this is not about me, it is about the courts and
24 the law. There is a reason why multiple district courts and
25 the Government Accountability Office looked at the underlying

1 issue that I dealt with originally regarding the status of the
2 Acting Secretary and came to a similar or same conclusion.
3 After the government's first notice, my chambers received a
4 number of messages directing criticism at the court, and
5 certainly the public has every right to disagree with judicial
6 decisions. And although I do not blame the government for
7 those comments made by the general public, I think it
8 underscores why it is so inappropriate to treat the work of
9 the court as if it is just the work of or the opinion of one
10 judge. So I urge the Justice Department to more carefully
11 oversee future notices of this type; not just in this case,
12 but generally speaking. And frankly, it bears on one of the
13 topics we are going to discuss today, which is whether the
14 government needs to seek prior approval by a court or this
15 court in issuing individual notices.

16 Having said all this, let me discuss with you the
17 outstanding issues. As I understand it, they fall into two
18 categories, and I would like to hear from the parties on each.

19 The first is the content and timing of
20 individualized notices to be mailed and the second is whether
21 new employment authorization documents known as EADs with
22 updated expiration dates must be mailed in addition to the
23 individualized notices. And I want to hear from both parties
24 on the issue of the notices to be mailed, and I would like you
25 to address several points. First, how many different versions

1 of the notice do the parties envision, how targeted will the
2 notices be based on the individual circumstances of the
3 recipient, also what should the deadline for issuing the
4 notices be. As I understand it, class counsel wants them out
5 by December 31st and the government believes that they need a
6 month, which would make the deadline for sending them out
7 January 8th. And also, should the government bring the text
8 of the notice or notices to the class counsel or the Court for
9 distribution.

10 So let's start with the issue of the individualized
11 notices and then we will move on to the EADs. Who would like
12 to start the discussion?

13 Don't all jump in at once.

14 MS. MARTINEZ-OLGUIN: I will, Your Honor.

15 THE COURT: Okay.

16 MS. MARTINEZ-OLGUIN: This is Araceli Martinez
17 Olguin for the Batalla Vidal plaintiffs.

18 Based on the conversations that we've had with the
19 government, my sense is that we are envisioning at least three
20 different notices. And I would direct you to the stipulations
21 that are on page 2 of the joint status report because I think
22 that there is one notice -- well, ostensibly, I -- it isn't
23 clear to us whether the government intends for the notices in
24 1 and 2 to be the same, but they could be. They go to the
25 same people, right? And then we envision that there will be a

1 second notice that goes -- that is issued to those who had
2 first-time requests for consideration of DACA rejected. And
3 then ostensibly, there would be a similar but different
4 notice that would be sent to individuals who submitted
5 applications for advance parole and had them rejected. So I
6 envision at least those three.

7 In terms of the timing, part of the issue here is
8 really a matter of plaintiffs' understanding that the Court
9 has already spoken on this. We took your December 4th order
10 saying that notices would be mailed to all class members by
11 December 31st as having already determined this issue. And
12 for that reason, and because we think that it is important for
13 our class members to get these notices as soon as possible,
14 that's one of the reasons that we are holding firm to the idea
15 of getting these out by December 31st.

16 THE COURT: Okay. Can we just --

17 MS. MARTINEZ-OLGUIN: To the final -- go ahead, sir.

18 THE COURT: Go ahead. Go ahead, please.

19 MS. MARTINEZ-OLGUIN: Okay. To the final point of
20 whether the -- about the content of the notices, it's our
21 understanding, from our experience, it is common for the
22 government to negotiate some of this language for immigrants
23 who have benefits denied and then the Court say that they
24 shouldn't have been denied those benefits. We are interested
25 in looking at them because also in our experience there is

1 value in having plaintiffs' counsel review them and fine tune
2 them and make sure that ultimately our class members receive
3 notices that are clear to them about what it is that's
4 happened and what it is that they can now do, that they can
5 resubmit, what rights have been determined by the courts. And
6 so our interest is ultimately in just -- in looking at it, we
7 are not interested in slowing down this process, we are not
8 looking to bring back or to either complain to the government
9 or to the Court about commas and periods or insignificant
10 matters. Instead, we're hoping simply to try and ensure that
11 the language that goes out to the clients is sufficiently
12 clear. And from our correspondence and exchanges with
13 Mr. Pezzi, our sense is that he thinks that it has everything
14 that we would expect. If that's the case, I can't imagine
15 that we couldn't turn that around to him in a very swift time
16 frame. In fact, I understood from the joint status report
17 that the government has a notice ready now. And if that's the
18 case, I think we could get him comments back by tomorrow,
19 noon.

20 THE COURT: All right. Before I turn to you,
21 Mr. Pezzi, let me just remind everyone on this conference that
22 under Local Rule 1.8 of the Rules of the Eastern District of
23 New York, you are not permitted to record in any way this
24 conference. Failure to adhere to this rule could result in
25 sanctions.

1 So I think that what the Court wanted DOJ to do to
2 get the wheels in motion, had December 31st in mind and to get
3 out the notices as quickly as possible, but also to make sure
4 that the notices would be appropriately crafted so that the
5 Court -- the Court, I will just say this, did not see
6 December 31st as an absolute cutoff date, we were just
7 shooting for an early date. And I am inclined -- having
8 worked in the federal government once, in the executive
9 branch, I am aware of some of the difficulties, practical
10 difficulties that exist in moving the process along. So I do
11 not have a rigid view on this, but if there is a good reason
12 why the government needs the extra week, I would like to hear
13 about it. And perhaps the extra week should be provided with
14 the ability of the parties to consult on the contents of the
15 notices. So, understand that I am sensitive to the mechanical
16 problems of getting things done in government agencies, and so
17 I have a little bit of sympathy for the difficulties of the
18 government when it is acting in good faith to get things
19 finished. That would not be an excuse, but it could be a
20 reason for moving this to the 8th.

21 So, let me hear from Mr. Pezzi.

22 MR. PEZZI: Thank you, Your Honor. Stephen Pezzi
23 from the Department of Justice.

24 First of all, I'm remarkably appreciative of
25 Your Honor's sympathies with respect to the practicalities of

1 moving something along like this within the federal
2 government. It is a massive logistical challenge and will be
3 a massive logistical challenge whether the deadline is
4 December 31st or January 8th. We're talking about mailings at
5 least upwards of 65,000 individualized notices through the
6 U.S. mail. I have gotten assurances from the agency clients
7 that I've been working with that although it will be a huge
8 challenge, they believe they can meet a January 8th deadline
9 as long as there aren't any unexpected difficulties. I have
10 asked for but not been able to get those same assurances, as
11 of today at least, with respect to December 31st, and that's
12 the reason we are asking for the additional time, because the
13 agency has real concerns about its actual ability to meet that
14 deadline.

15 With respect to the content of the notices, so,
16 first of all, to answer Your Honor's question, plaintiffs are
17 correct that the government is contemplating three different
18 notices here. What are listed as paragraphs 1 and 2 in the
19 parties' agreement would be combined in a single document
20 which would be individualized paper notice on secured paper
21 with secured features. You know, Your Honor might be familiar
22 with when you look at a check, for example, there might be a
23 watermark or some micro-printing. To be clear, this is not
24 just, you know, a letter somebody prints out on their home
25 computer. And that individualized document would provide

1 notice that the one-year employment authorization document has
2 been extended for two years, as well as that the period of
3 deferred action granted under the DACA policy has been
4 extended for an additional year.

5 Paragraphs 3 and 4 of the status report go to
6 individuals who had either first-time DACA requests or
7 requests for DACA-based advance parole rejected pursuant to
8 the Wolf memorandum that Your Honor has now vacated. Those
9 individuals would fall into two separate buckets with two
10 separate notices, you know, simply making clear that that
11 individual can and should resubmit their application and it
12 would be adjudicated under the terms that are now in effect.
13 I would also note that to the extent the application had
14 already been submitted and remains pending before the agency
15 but had not yet received a final adjudication, and I
16 understand there are some of those, that those applications
17 would not need to be resubmitted and instead they would just
18 now be adjudicated pursuant to the terms and conditions of the
19 policies that were in effect prior to September 5th, 2017.

20 And I think we have broad agreement with the
21 plaintiffs on more or less everything that I just said.
22 That's part of the reason the government has opposed the
23 additional step of sharing those drafts with plaintiffs and
24 engaging in a back-and-forth process. From our perspective,
25 the parties have reached agreement on the important substance

1 of these documents and it's now a wordsmithing exercise
2 followed by a very substantial logistical and IT effort on the
3 government's side to actually get these documents printed
4 with, you know, 70,000 correct names and addresses on secured
5 paper and out the door.

6 Certainly, to be clear, that remains our position.
7 Although if Your Honor was inclined to order some sort of back
8 and forth with plaintiffs on actually reviewing drafts of the
9 notice, plaintiffs are correct. And I informed them before
10 this status conference that, I mean, there are already drafts
11 working their way through the approval process within the
12 government and if we were ordered to share those with
13 plaintiffs, again, that's not our preference --

14 THE COURT: Right.

15 MR. PEZZI: We certainly appreciate their ability to
16 get comments back to us by noon tomorrow because every day
17 that goes by at this point will require pushing out the
18 schedule to some degree.

19 THE COURT: Yes. Having had the experience of
20 seeing the original notice on the website, I am inclined to --
21 I am concerned that if there is something substantial that the
22 plaintiffs feel is extremely serious, that, you know, for you
23 to send everything out and then have the discussion about
24 whether something needs to be changed is really something that
25 should be avoided.

1 Could you all put your computers on mute for the
2 moment? Thanks.

3 So I am going to order that you provide the drafts
4 to the plaintiffs and that they respond to you by
5 5:00 tomorrow afternoon. And only on something really, really
6 serious that they believe is so consequential that you would
7 want to come to me on a Saturday morning about it. And, you
8 know, weekends for judges are work days, but I would rather
9 not be working on this this Saturday. So, I mean, that is
10 really my view. You know, I appreciate the good faith efforts
11 of the government to get this done and ready to process
12 promptly next week. So I am just going to order that there be
13 the back and forth and that by the end of the day tomorrow,
14 the plaintiffs advise the Court as to whether there is any
15 significant objection to any of the contents of these notices.
16 You know, a few words here or there that are not consequential
17 should not be the subject of a letter to the Court. All
18 right?

19 MS. MARTINEZ-OLGUIN: Your Honor?

20 THE COURT: Yes?

21 MS. MARTINEZ-OLGUIN: Apologies. Araceli
22 Martinez-Olguin for the Batalla Vidal plaintiffs.

23 Could we just get some clarity about when to expect
24 the government's draft? I think we're fine with the 5:00, I
25 appreciate the few extra hours, but should we expect that to

1 you from you all?

2 THE COURT: Can you provide it today, Mr. Pezzi?

3 MR. PEZZI: My preference would be to avoid a
4 specific deadline, but my expectation is that I will be able
5 to provide something before 11:59 p.m. tonight. As a
6 practical matter, I will get it to you all as soon as I
7 possibly can.

8 THE COURT: Thank you very much. Thank you.

9 And so I take it we do not have to go through, at
10 this point, the issue of privilege? I mean, if there is
11 something that is missing that you believe is privileged, you
12 are going to bring that to my attention when it is brought to
13 my -- the government will bring that issue to my attention if
14 the plaintiffs are raising an issue, a question that may raise
15 the specter of privilege; is that right?

16 MR. PEZZI: That works from the government's
17 perspective, Your Honor. My expectation is we will do
18 everything we can to actually finalize the drafts within the
19 government today and get it as close to that point as we can
20 and then share that document with plaintiffs. I will do
21 everything that I can to make that happen.

22 THE COURT: And if all goes well, I believe that the
23 January 8th deadline is appropriate and will be sufficient for
24 the members of the class to receive these materials in a
25 timely fashion. So I am going to order that the notices be

1 sent to the members of the class in each of the categories on
2 or before January 8th, 2021. It's so ordered. All right?

3 Is that all we have on the first item? Because
4 there is the issue of the second item and on the new EADs.
5 And let me tell you just to cut to the chase, I understand the
6 government's problem in terms of issuing a new EAD for two
7 years when the one-year EAD may not have expired already. In
8 other words, there would be two valid EADs at the same moment
9 in the hands of the same DACA recipient. And the government
10 is concerned that it can provide the additional material, a
11 document that extends the EAD that can be shown to an employer
12 with the one-year EAD. Is that your basic position,
13 Mr. Pezzi?

14 MR. PEZZI: Yes, Your Honor. As a legal matter, the
15 notice that we are talking about, when combined with the
16 one-year EAD, would be identical to the EAD.

17 THE COURT: Let me hear from plaintiffs on that
18 issue, because I don't want to reach any conclusions without
19 hearing from the plaintiffs as to why that may not be
20 sufficient.

21 MS. MARTINEZ-OLGUIN: Yes, Your Honor.

22 Apologies, I am getting a little bit of feedback.

23 This is what is at the heart of our dispute -- ah,
24 thank you. Essentially, Your Honor, the question here is
25 about whether or not having a one-year EAD and that extra, you

1 know, secure but essentially piece of paper from the
2 government really suffices to make our class whole, and in
3 particular, the 65,800 individuals who right now have those
4 one-year EADs. You have in front of you declarations from
5 some of our named plaintiffs, from Carolina Fung Feng and from
6 Martin Batalla Vidal. You have from them declarations that
7 speak to the additional employment discrimination that
8 presents itself when you are an EAD holder, much less someone
9 who is holding an EAD and then bringing this additional piece
10 of paper to an employer. And so I think in the end, because
11 of some of the additional challenges that it will present to
12 folks, both it will subject them to -- it will open them up to
13 additional employment discrimination, as well as just make it
14 more difficult to do things like -- the EADs are used for many
15 more things, including for the issuance of driver's licenses,
16 to secure a driver's license, to open bank accounts, to get
17 mortgages. But the EAD is the primary -- is a primary
18 identification document for many DACA recipients. And so
19 walking around with an expired document or something that
20 could be expiring and then saying that it's extended,
21 ultimately, we think, doesn't make our clients whole and
22 leaves them with perhaps something that is swift but not
23 sufficiently effective. And our goal ultimately is to get
24 both -- is to get something that is both swift and effective.
25 We appreciate the swiftness with which the government is

1 offering to put out these notices, we absolutely do want that
2 for them. In all candor, if it were possible to get the
3 second correct EAD out to everyone quickly, that would have
4 been the end of the dispute. We very much recognize that the
5 government, though is in this position in part through their
6 own making because ultimately these were issued under an
7 unlawful policy adopted by Mr. Wolf, we do appreciate that at
8 this point to correct it will require time and energy from
9 them, which is why ultimately we are asking for both these
10 notices that we've been discussing as well as an EAD that
11 comes some time later.

12 I noted in the joint status report that at the -- I
13 believe it's at the bottom of page 8 in footnote 4. The
14 government notes that if the Court does order them to provide
15 updated EADs, they would ask that that deadline be no earlier
16 than nine months into their current validity periods. And I
17 just want to note for the Court that plaintiffs are amenable
18 to that, or at least the Batalla Vidal plaintiffs are amenable
19 to that timeline.

20 MR. PEZZI: Your Honor, you're on mute.

21 THE COURT: That the EADs, the updated EADs would be
22 issued no earlier than nine months into the validity period of
23 the one-year EADs? Well, I think that is a solution so
24 that -- but I also think that it is possible that for some of
25 the holders of the EADs, having the letter or the extension

1 document will be sufficient. And if there is some way of
2 informing the EAD holders that if they have a problem
3 utilizing their EADs, that there is a process for issuing an
4 EAD for the full two-year period. In other words, not having
5 to issue an EAD to everyone for the two-year period, but
6 issuing it on a priority basis to those who are applying for a
7 mortgage with some bank that, you know, makes all kind of
8 demands and says this piece of paper is not good enough for
9 us. So I am just concerned that it is not so easy to prepare
10 these EADs and I just have to give some thought to how to
11 manage this in a way that achieves the objective but does not
12 create a bigger problem. There are some people who are going
13 to need these two-year EADs because for whatever reason the
14 bank or the employer, if it is a big employer or a small
15 employer, has very rigid rules about accepting these
16 documents. And there are others who are just going along and
17 they are doing just fine and no one cares. So I am just
18 wondering how we can deal with the magnitude of issuing all
19 these new EADs promptly when some people need them right away
20 and some people do not. So I just think that is -- that is my
21 concern.

22 MS. MARTINEZ-OLGUIN: Judge, the other thing that I
23 would point out, I've listed a few examples and to the extent
24 that you're thinking about all of the potential ways that the
25 one-year EAD could pose -- and the extension notice could pose

1 a problem, I think I would like to add a few more things and
2 register them with you in terms the way EADs are used. I've
3 mentioned driver's licenses and bank accounts, right? But
4 folks also use them to register for utilities, to access
5 healthcare programs, for domestic travel, right? One of our
6 named plaintiffs, Antonio Alarcon in Georgia, needed his EAD
7 just to be able to do some of that travel. And for
8 educational purposes, to show that, that you can access
9 scholarship money. And I think the piece that I would leave,
10 that I would highlight for you here is that it is -- with some
11 of these things, the time that it would take to have to get
12 the new EAD, if -- what I hear you suggesting is registering
13 that you've had a problem so that you can get a priority
14 document sometime thereafter, I think leaves -- would likely
15 leave people harmed still by the Wolf memo because they would
16 need -- they would have to experience an additional harm,
17 register that problem, then get their second EAD. And I worry
18 that ultimately -- mm-hm.

19 THE COURT: Let me hear from the defendant, the
20 government.

21 MR. PEZZI: Thank you, Your Honor.

22 I'd say a few things about the additional request
23 for EAD documents.

24 So, first of all, I entirely sympathize and
25 understand plaintiff's concern that there might be someone out

1 there, some employer, some bank, somebody that, you know,
2 looks at the one-year EAD and looks at the government's notice
3 and is either confused or for some reason inappropriately, you
4 know, doesn't respect the documents in the way that they
5 should. That's part of the reason that the government
6 proposed what ultimately became No. 5 in the parties'
7 agreement, which is that by January 8th, 2020 -- or 2021,
8 excuse me, the government would prepare and publish and
9 distribute guidance on this precise subject, making clear to
10 anyone who reads that guidance, whether it be private
11 employers or state agencies or anyone in between, that from
12 the perspective of the Department of Homeland Security, a
13 one-year EAD plus this individualized notice on secure paper
14 is to be treated for all purposes identically to a two-year
15 EAD. And so the very purpose of that proposal was to mitigate
16 some of these very concerns.

17 I will also note that the government -- I mean, the
18 Department of Homeland Security is first and foremost a
19 national security and a law enforcement agency. And so for
20 obvious reasons that I'm sure Your Honor and plaintiffs
21 understand, they try very hard to avoid a situation like we're
22 talking about here where there's even, you know, a small
23 possibility or even a short window where the same person could
24 be issued two different validity -- or two different documents
25 that, you know, verify their identity. And so as a practical

1 matter, what we would have to do would be something like send
2 everyone a new two-year EAD or, you know, any individuals that
3 were entitled to this relief, a new two-year EAD along with a
4 letter saying, you know, please return your old EAD and we'll
5 shred it when it gets back to the agency. As a practical
6 matter, in some prior instances where the agency has had to do
7 that for one reason or another, they never receive all of them
8 back, of course, as a practical matter, and so there's some
9 number that are just out there in the world. And that,
10 understandably, makes a law enforcement agency and a national
11 security agency nervous.

12 As for --

13 THE COURT: Well, you know, let me just look at it
14 this way. If you get a new driver's license from -- you mail
15 in an application or send one in by e-mail or online, make an
16 application online, you get a new license, but you still have
17 the old license which may be valid for another 30 days or
18 another 60 days, so you've got two licenses, the same -- it is
19 the same problem, in effect. So if the Court orders that DHS
20 supply a new EAD no later than 30 days before the expiration
21 of the old EAD, extending the time for the extra year let's
22 say, then that would mitigate that problem, would it not? Are
23 you capable of doing that?

24 MR. PEZZI: I certainly agree it would mitigate the
25 problem; it would not solve the problem, for the reasons that

1 we have identified.

2 And the last thing I would say is, I mean,
3 plaintiffs' discussion about, you know, making everyone whole,
4 obviously the government is trying very hard to implement
5 Your Honor's order in a way that addresses plaintiffs'
6 concerns and Your Honor's concerns about the effects of the
7 Wolf memorandum. I do think it's important to remind
8 Your Honor that as a legal matter, I mean, it's not like a
9 contract claim where you're, you know, entitled to be made
10 whole or get the benefit of your bargain. On an APA claim,
11 the typical remedy is limited to vacating the agency memo, not
12 to trying to restore every individual plaintiff into exactly
13 the world that they were in. And so, you know, we're
14 obviously making significant strides and have reached a lot of
15 agreements with plaintiffs to address some of these concerns.
16 We don't think there's any legal basis for this request and we
17 have some significant practical concerns that we've already
18 worked very hard to address with the other relief that we have
19 agreed to.

20 THE COURT: Well, let me just take it one step
21 forward. What happens if a DACA recipient with an EAD goes to
22 the Motor Vehicles in some state, I don't know where, and
23 presents the EAD which is current, or not current, and the
24 letter which is on, you know, some sort of, you know,
25 watermarked government paper and the clerk, because there is

1 going to be a clerk, who has never seen this before says,
2 well, you know, the EAD is expired and you've got this letter,
3 but why don't you have a new EAD? What happens then is that
4 the person is going to be turned away because it is
5 just clerks who have never seen this before. Look, I have had
6 clerks who have turned me away when everything is valid,
7 everything is good, but they just do not seem to think it is
8 just right. And so now we have these DACA recipients who are
9 trying to, you know, negotiate these situations with
10 government agencies or with a bank, which I think can be worse
11 than being with a government agency, dealing with a government
12 agency, and they have a problem. What do they do then? If I
13 leave it the way you recommend it, and you make a good
14 argument, how do they address that problem? We would need to
15 tell them what they can do to get a new EAD so that they can
16 do the business that they have the right to do, and that would
17 take time. So I am just wondering whether this is becoming
18 very much more complicated than it needs to be.

19 MR. PEZZI: And, Your Honor, very quickly on that.

20 I would just say again, first of all, I mean, the
21 guidance that we're talking about preparing could be, and I
22 think we intend to make it accessible to, you know, state
23 government agencies. There's a federal government database
24 that is specifically designed for state benefit agencies, for
25 example, to be able to, you know, receive updates from the

1 Department of Homeland Security about these very sorts of
2 things.

3 The sort of concerns that Your Honor is raising
4 regrettably already exist with respect to, you know, normal --
5 I mean, if you're a DACA recipient with any EAD -- I know the
6 plaintiffs have detailed in declarations -- there's always
7 some risk that someone in some DMV in some state is not going
8 to understand federal law. And I don't think that's a problem
9 that, you know, either DHS or Your Honor is going to be able
10 to solve, regrettably. And so to be clear, for purposes of
11 federal law and for any purpose by which any entity, public or
12 private, using an EAD as a form of verification, the proposal
13 that we are offering would be identical in every way to a
14 two-year EAD. And so the only concern is someone who is
15 either, you know, not following the rules and the
16 understanding that is set forth by DHS. And that's a concern
17 that exists even with the status quo.

18 So, I mean, I wish there was an easier solution that
19 did not present the same concerns with respect to fraud, for
20 example, but those are the reasons why the government felt as
21 to oppose to this request.

22 MR. COLANGELO: Your Honor, this is Matthew
23 Colangelo for the State of New York.

24 If I can chime in, Your Honor, just on the point
25 that Mr. Pezzi just --

1 THE COURT: Sure, please do.

2 MR. COLANGELO: Thank you, Your Honor.

3 On the point Mr. Pezzi just raised regarding fraud
4 and from the perspective of a law enforcement agency, the
5 New York Attorney General's Office is also quite obviously a
6 law enforcement agency as well, and so we take seriously the
7 concerns about fraud. But we think those risks here are
8 exceedingly minimal for a range of reasons, including for all
9 of the impressive security features in the new notice
10 documents that Mr. Pezzi just described, as well as more
11 fundamentally, the fact that these identification documents
12 are -- you know, contain each individual's biometric
13 information and photograph. These are not documents that are
14 particularly susceptible to fraud for the same reason
15 Your Honor already identified. And so we'd have to balance
16 that against the quite significant and quite obvious, we
17 believe, advantages in increased utility and administrability
18 to state government agencies of having a replacement EAD for
19 individuals who should have received a two-year EAD in the
20 first place.

21 THE COURT: All right. I'm sorry, Mr. Colangelo,
22 the system bogged out on me, so start your statement again.
23 You have practiced it now, so let me hear from you. Sorry
24 about that.

25 MR. COLANGELO: No problem, Your Honor. Let me see

1 how close I can get to saying it the same way.

2 As a law enforcement agency ourselves, the New York
3 Attorney General is sympathetic to and takes quite seriously
4 the concerns about fraud. We think those concerns are quite
5 low here because these documents are secure. They contain
6 photo identification and biometric information and are not
7 susceptible to fraud. And as state governments ourselves,
8 whose agencies rely on EADs for driver's license applications,
9 nondriver identification cards, other public benefit
10 applications, we are balancing what we believe is the very low
11 risk of fraud against a pretty significant increased utility
12 to the recipients and the increased administrability to our
13 agencies of making sure that DACA recipients who should have
14 received a two-year EAD in the first place ultimately get one,
15 and we think the compromise proposal in the joint status
16 report accomplishes that goal and mitigates the risk of fraud.

17 Thank you, Your Honor.

18 THE COURT: Do you know how many of these EADs will
19 expire in the next month, for instance?

20 MS. MARTINEZ-OLGUIN: None, Your Honor. From the
21 declaration that was submitted by the federal government,
22 Mr. Edlow's declaration, they won't expire -- the first of
23 these won't expire until August.

24 MR. PEZZI: And that's correct, Your Honor.
25 Remember, these were one-year EADs that were issued pursuant

1 to the Wolf memorandum which came out on July 28th, so the
2 earliest EADs we're talking about were issued in early
3 August of 2020. And so the earliest expiration dates are
4 early August of 2021.

5 THE COURT: So I am going to simply direct that no
6 later than 30 days before the expiration of the one-year EADs,
7 that a new EAD be provided extending the EAD for a year so as
8 to make them two-year EADs. And so there is plenty of time to
9 achieve that; we are not up against an immediate deadline.
10 And this will facilitate clarity for the recipients of the
11 EADs. And consequently, the government will not have to send
12 out certificates, they will simply send out the new EADs no
13 later than 30 days before the expiration of the old ones.

14 MS. MARTINEZ-OLGUIN: Judge, I'm sorry, can I ask
15 you to clarify that? Are you suggesting that that's instead
16 of the notices that folks would get in 30 days or in addition
17 to? In addition to?

18 THE COURT: They could get the notices, but the
19 notices would be clear that the notices would expire at the
20 time that the new EADs would become valid, in other words.

21 I know it sounds complicated, but they will
22 understand how to do it. They are very capable. DHS has very
23 capable administrators who are career employees who know how
24 to do these things. I am sure that they can achieve the
25 extension to the two years by sending out a new EAD within

1 30 days, no later than 30 days before the expiration of the
2 old one.

3 So, I mean, that is how I would resolve it. I
4 thought these were going to expire in the next month. But if
5 they are not expiring until August of 2021, then I do not see
6 that there is a major administrative difficulty in getting out
7 the new EADs. That is really what I am saying to you all.

8 MS. MARTINEZ-OLGUIN: Your Honor, could I ask you to
9 also clarify that that will be at no cost?

10 THE COURT: I will put it in an order on ECF so
11 that, you know, it is clear what my position is on this.

12 And if you need me to clarify it, Mr. Pezzi, I am
13 happy to do that. But I think this is something that can be
14 achieved within the next seven and a half months. It is
15 really seven and a half months.

16 But I also made clear that I appreciate and am
17 concerned about your admission regarding people who -- or
18 losing an EAD. But on the other hand, I think that this will
19 solve the problem.

20 Yes, ma'am?

21 MS. MARTINEZ-OLGUIN: And, Judge, just to be clear,
22 that second EAD will be at no cost to the current one-year EAD
23 holders?

24 THE COURT: No -- yes, well, because it is now a
25 two-year EAD, they have already paid for it.

1 MS. MARTINEZ-OLGUIN: Thank you.

2 (Pause.)

3 MS. MARTINEZ-OLGUIN: Judge, I think we're done,
4 yeah.

5 THE COURT: What else do we have for today?

6 Anything from you, Mr. Pezzi?

7 MR. PEZZI: One minor housekeeping, Your Honor.

8 Your Honor issued an order, a minute order a few
9 weeks ago making clear that the government's obligation to
10 answer or otherwise respond to plaintiffs' latest amended
11 complaints was stayed pending our working on these issues. If
12 we could just get some additional clarity from your Your Honor
13 that that obligation remains stayed pending further order of
14 the Court. I don't think --

15 THE COURT: Yes, that obligation is stayed pending
16 further order of the Court. And hopefully, the Court will
17 never have to deal with it.

18 MR. PEZZI: That works for the government,
19 Your Honor.

20 THE COURT: Okay.

21 Mr. Colangelo, you are smiling. Did you bring
22 something to the meeting?

23 MR. COLANGELO: No, Your Honor. I just was
24 commiserating with the Court's interest in never having to
25 deal with that particular issue. Thank you, Your Honor.

1 THE COURT: Anything else from the class at this
2 point?

3 MS. MARTINEZ-OLGUIN: No, Your Honor. Thank you.

4 THE COURT: Well, let me again say that I really do
5 appreciate the efforts of all the participants in this process
6 to achieve closure on some of these issues without help from
7 me and so you do have my thanks for that.

8 And I have an admonition. You are to wear a mask,
9 you are to socially distance, and you are to stay in your
10 pods, you know, so that the next time we meet, should that be
11 necessary, you will all be here with me.

12 So, thank you very much. Have a good holiday.

13 Let me know if there is anything I need to do on
14 Saturday morning. But I am going to issue an order on the
15 items that we have discussed today just so that it is as clear
16 as can be. All right?

17 Thank you, everyone.

18 MS. MARTINEZ-OLGUIN: Thank you, Your Honor.

19 MR. PEZZI: Thank you, Your Honor.

20 (Matter concluded.)

21 * * * * *

22 I certify that the foregoing is a correct transcript from the
23 record of proceedings in the above-entitled matter.

24 /s/ Andronikh M. Barna

December 10, 2020

25 _____
ANDRONIKH M. BARNA

DATE